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June 4, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 31, 2004

Case No.: TIA-0072

XXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be granted.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those illnesses include beryllium disease and specified cancers associated with radiation exposure. 42 U.S.C. § 7341l(9). The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u. To implement the program, the DOL has issued

regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not itself provide any monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. 2/

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

B. Factual Background

In the application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that the worker was employed from November 1954 through May 2, 1989 as a machinist at the DOE site in Oak Ridge, Tennessee. Record at 9. The applicant

1/ See www.dol.gov/esa.

2/ The OWA is responsible for this program and has a web site that provides extensive information concerning the program. See www.eh.doe.gov/advocacy.

contends that the worker had "lung disease" as a result of exposure to beryllium at the DOE work site. 3/

The Physician Panel issued a negative determination on this claim. The Panel unanimously found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

The Panel determined that the worker did not have beryllium disease. The Panel found that a more probable explanation of the worker's lung illness was "histoplasmosis." The Panel issued a negative determination with respect to the claim. See December 12, 2003 Physician Panel Report.

The Panel's decision was adopted by the OWA. Accordingly, that Office determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. March 1, 2004 Letter from DOE to the applicant. The applicant appeals that determination.

II. Analysis

In her appeal, the applicant contests the Physician Panel's determination that the worker's lung condition was not beryllium disease. In this regard, the applicant points out that DOL determined that the worker had chronic beryllium disease (CBD) under the standards set forth in the EEOICPA and awarded him \$150,000 pursuant to the Act. Record at 316.

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the

3/ The worker died of acute myocardial infarction on May 2, 1989. Record at 16. The applicant also claimed that the worker suffered from kidney disease. This claim was rejected by the Panel, and by the DOL. It does not form part of the instant appeal. In her original claim, the applicant also cited radiation exposure as a possible cause of the worker's illness. That allegation has not been raised in this proceeding.

course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the relevant information, including any conflicting information.

I believe that the Panel did not adequately explain the basis for its determination. Standards for determining whether a worker has CBD are set out in the Act. See 42 U.S.C. § 7384i(13)(B). In view of the fact that DOL applied those standards and found that the worker did suffer from CBD, the Panel should explain why it disagrees with the DOL result. On remand, the Panel should indicate whether it applied a different standard. If the Panel did use a different standard, it should explain why it did so, what that standard was, and what medical evidence exists supporting a finding that the worker did not suffer from CBD under that standard. If the Panel applied the statutory standard, it should explain its determination. As part of its reconsideration of this matter, the Panel should explain in detail if it disagrees with the assertions and conclusions set forth in the "Statement of Case" that forms part of the DOL Recommended Decision in this case. Record at 358. If on remand the Panel reconsiders its original opinion and agrees with DOL, it may, of course, issue a new determination consistent with that revised decision.

III. Conclusion

As the foregoing indicates, the appeal should be granted and this matter should be remanded to OWA for further action consistent with the above determination.

IT IS THEREFORE ORDERED THAT:

- (1) The appeal filed in Worker Advocacy Case No. TIA-0072 be, and hereby is, granted as set forth in Paragraph (2) below.
- (2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 4, 2004